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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 346.

LOUISIANA DELTA CATTLE CO., INC.,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR REHEARING.

(Certiorari denied, October 13, 1941.)

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PETITION FOR REHEARING.

(Certiorari denied, October 13, 1941.)

Petitioner, Louisiana Delta Cattle Co., Inc., by its attorney, respectfully moves the Court to set aside its order of October 13, 1941, denying writ of certiorari herein, and by rehearing the petition therefor, to grant same:

For cause, it is respectfully shown:

GROUNDS FOR REHEARING.

The petition for the writ stated as Specification of Error (p. 4):

The Court below erred:

(1) In holding said petition does not state a good and sufficient cause of action when tested by the motion to dismiss.

Disclaiming any purpose to impose by reiteration, petitioner respectfully submits as supplementary thereto:

(a) The petition below states a cause of action because the alleged and admitted destruction of the drainage of the acreage by the cut-off levee constitutes the destruction of an appurtenant property right that exists under civil law of Louisiana and is protected by the Constitution.

(b) The relief sought by petitioner is to be ascertained, not from one paragraph, but on the contrary from all the paragraphs of the petition below.

ARGUMENT.

The short question is the sufficiency of the petition below, with its allegations admitted by the motion to dismiss, to entitle petitioner to be heard upon the merits of its claim of constitutional right to compensation for the taking of its private property for public use. Presentation of the question is difficult because its possible *per curiam* disposal suggests expansion of the petition for the writ and its brief into the detail usually found in the brief upon the merits after grant of certiorari. Consideration of the question is especially important to the petitioner because the Court of Claims judgment of dismissal is of first instance, and its review is only a matter of discretion upon a petition for certiorari.

This short question involves new horizons. Present judicial view of them involves the possibility of new issues arising in the present case as the result of the abandonment by Congress of the Eads plan of 1883[1] and the substitution of the new Jadwin plan of 1928[2] for flood control. Illustrative of such new horizons, is the 1928 provision for recovery if land is damaged by the erection of new levees on the op-

[1] Summarized in *Jackson* v. *United States*, 230 U. S. 22, 23.

[2] Summarized as the substituted plan in *United States* v. *Sponenbarger*, 308 U. S. 256, 261.

posite bank of a river;[3] or the right of recovery here when it will appear (as found by the Court below in another case[4] referred to in the opinion below herein, (R. p. 10), as containing matter of fact not yet appearing in this case) that both the river side levees joined to the cut-off levee and the cut-off levee were all broadened and raised 3½ feet, to the 1928 plan, and have thereby imposed greater burdens upon the weaker river-side levees of 1914 grade and elevation, around the petitioner acreage; or when it appears the self-defense right of fuse-plugs, put forward as a permitted and sufficient remedy of the encircled petitioner in the Opposition Brief, (p. 6), cannot be exercised in the cut-off levee[5], and in the weaker river-side levees would but invite invasion by the river waters; or when it is admitted the cut-off levee stopped and destroyed the property right

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[3] (a) noted as unnecessary for decision in *United States* v. *Sponenbarger* (*supra*), p. 270.

(b) denied under the Eads plan legislation in *Jackson* v. *United States* (*supra*).

[4] *Bennington County Savings Bank* v. *United States*, 91 Ct. Cls. 160. It seems reasonable to assume this Court will judicially notice the findings therein as did the court below in its opinion to note the evidentiary facts as to the changes effected by the 1928 Flood Control operations, to wit:

> "The New Levee was built to the grade and section standardized in 1928 which is about 3½ feet higher than the 1914 grade and section, with proportionately wider base. At the same time the old levee above and below Wilson Point New Levee previously of the 1914 grade and section, was, with the exception of that portion extending around Bunches Bend, raised and enlarged to the 1928 grade and section, so that thereafter the Wilson Point New Levee formed a part of a uniform levee higher and larger than that around the remaining boundary of Bunches Bend. Bunches Bend is accordingly protected from the river only by a levee of 1914 grade and section rather than by a levee of 1928 grade and section."

[5] *United States* v. *Sponenbarger* (*supra*), citing Act of March 3, 1899 (33 U. S. C. A. 408).

of drainage appurtenant to petitioner acreage under the civil law of Louisiana.[6]

The right to be heard upon such matters is respectfully asserted where it appears by the allegations, admitted as facts by the motion to dismiss, that, with reference to the new levee line established by the cut-off levee being joined into the river-side levees at its ends, the petitioner plantation is placed on the river side, without drainage or means of self-defense against an annual seasonal 60 inch rain-fall and seepage, so that its arable lands are changed into bog, and so that, upon the intended dissolution of its weakened riverside levees, the plantation lands will be entirely wasted into the river. In the Flood Control Act of 1928, Congress distinctly disclaimed further reliance upon the principle of local contribution to flood control.[7]

Such situation is submitted to invite the discretion of this Court as perhaps not sufficiently presented or emphasized in the petition for the writ, and, consequently, as perhaps not entirely understood in the original consideration thereof. Such situation, provoked by the execution of the Jadwin plan, is submitted notwithstanding that, in a similar case, arising under the Eads plan of 1883, but not involving the present issue of drainage-stoppage, this Court held such encirclement did not result in a compensible taking. In so deciding, the Court excluded the drainage issue because it

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[6] Turning judicial notice again, as suggested in Note 4, to the Bennington case, it may be the admitted stoppage of drainage herein was disregarded below because the Court found the Bennington drainage was not affected. The findings set out the evidentiary facts as to the drainage and stoppage generally alleged by the present petitioner as follows:

> "Along the center line of Bunches Bend is a drainage ditch or canal, called Jack Falls Drainage Canal. This canal originates in the upper or northern end of Bunches Bend, and before the construction of the Wilson Point New Levee it terminated and emptied some distance beyond in Lake Providence. * * *"

The defendant closed Jack Falls Drainage Canal July 31, 1934.

[7] Petition, pp. 2, 17.

appeared claimant has been compensated therefor by the state.[8]

This recognition of drainage-stoppage as compensible serves to introduce its materiality to the first proposition herein submitted as a ground for reconsideration.

(a) The Petition Below States a Cause of Action Because the alleged and Admitted Destruction of the Drainage of the Acreage by the Cut-off Levee Constitutes the Destruction of an Appurtenant Property Right that Exists Under Civil Law of Louisiana and is Protected by the Constitution.

The petition for the writ, (p. 15), emphasizes the right to drainage, but only as equivalent to a right of way.

If the matters now suggested be sufficiently pertinent to the interests of justice, it follows that this Court has recognized explicitly the civil law doctrine that upholds the natural right or easement of drainage as between dominant and servient estates, and the contrary common law doctrine that denies such right. It has further explicity said in the same opinion:

> "If a case came to this Court from one of the states in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law to follow the decisions of that state. And in like manner we should follow the adverse ruling in a case coming from one of the states in which the common law rule is recognized."[9]

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[8] *Hughes* v. *United States*, 230 U. S. 24, 32.

[9] *Walker* v. *New Mexico & S. P. R. Co.* (1897), 165 U. S. 593, 604.

The civil law doctrine, prevailing in Louisiana, is expressly stated in its civil code[10], and upheld in its jurisprudence.[11]

The right is a vested one protected by the Constitution[12], and is inclusive of the flow of seepage waters that accummulate behind levees as the result of flood conditions.[13]

The denial by the judgment below that the appurtenant property right of petitioner to drainage of its acreage is not compensible when admittedly and presently destroyed by the set-off levee is submitted as ignoring the sufficiency of the petition. It further suggests consideration of the judgment as presenting a conflict with local law, or as requiring the exercise of supervisory power herein.

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[10] Civil Code of Louisiana, Section 660 (quoted as appearing in *Caldwell* v. *Gore*, 175 La. 502, 143 Sou. 387):

> "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water. The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome."

[11] *Martin* v. *Jett* (1838), 12 La. 501, 52 Am. Dec. 120n.
Hebert v. *Hudson* (1839), 13 La. 54.
Hays v. *Hays* (1841), 19 La. 351.
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Foley v. *Godchaux* (1896), 48 La. Ann. 466, 19 Sou. 247.
Petit Anse Coteau D. D. v. *Iberia & V. R. Co.* (1910), 124 La. 502.
Caldwell v. *Gore, supra.*

[12] *Hooper* v. *Wilkinson, supra.*
Miller v. *Letzerich*, —— Tex. ——, 49 S. W. (2) 404.

[13] *Gray* v. *McWilliams*, 98 Calif. 157, 32 Pac. 967.

(b) The Relief Sought by Petitioner is to be Ascertained Not from One Paragraph, but on the Contrary from All the Paragraphs of the Petition Below.

The gravamen of the claim is presented in Paragraphs IV V and VI, (R. pp. 3-5), without evidentiary detail.[14]

It is submitted as evident that neither these allegations nor the summary of same put into the opinion below, (R. pp. 7-9), justify the conclusion, (R. p. 9), of the opinion:

> "There is no allegation that anything has been done so far that has actually injured or impaired plaintiff's

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[14]

Paragraph IV	Paragraph V	Paragraph VI
Paragraph IV alleges the situation before and after erection of the set-back levee, and that it "*is intended to, does and will withdraw levee protection*" "*that said new levee was tied into the previously existing levees in , 1934, and drainage outlets previously existing were stopped and made ineffective.*"	Paragraph V alleges "*by said Levee defendant has segregated and excluded all land and improvements from levee protection and drainage, whereby (they), through lack of drainage will be innundated by natural rainfall, which averages 60 inches annually and converted into a bog or marsh unfilled for cultivation, and whereby, in event of abandonment or removal of the previous levees * * * which defendant purposes to accomplish and obtain, the river waters will * * * break through * * * putting said lands permanently in the bed of the river * * * and the lands will be made unfit and entirely destroyed.*"	Paragraph VI alleges "*defendant has deprived and does deprive plaintiff of levee protection * * * and of drainage * * * and has exposed the lands and improvements to the overflow and ravages of the river water * * * and to be taken for public use, damaged and destroyed without compensation.*" * * *

property or deprived plaintiff of its use in whole or in part."

The statement of a cause of action in the several paragraphs is submitted sufficient when tested by the equivalence of the compensation claimed in the present action, upon an implied contract for the taking without condemnation, to the compensation to be awarded in a condemnation proceeding to obtain the taking.[15] The time of taking is fixed by its occurrence or by statute usually, and if there is no occurrence and no time fixed by statute, as is the case of the Flood Control Act, the time of taking becomes the time of payment of the compensation.[16] If there had been a condemnation proceeding before the alleged taking herein its allegations and evidence must have been of prospective matter.[17] In the implied liability proceeding instituted subsequent to the alleged taking, the allegations and evidence again are both prospective and retrospective, in that the taking provokes consequences, the occurrence of which establishes its consummation and extent. The petition below frames the taking, its natural and inevitable ultimate consequences, and their consummation, and raises its claim thereon. The allegations of taking supported by the admitted overt acts become conclusions of fact and not of law.[18]

The petition below is further submitted sufficient because a claimant is not held bound by special rules of pleading in the Court of Claims so as to be precluded from recovery of

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[15] *Hurley* v. *Kincaid*, 285 U. S. 95, 104.

[16] *Danforth* v. *United States*, 308 U. S. 271, 284, (decided subsequent to the filing of the petition below).

[17] *Olsen* v. *United States*, 292 U. S. 246, 257.

[18] *Portsmouth Harbor L. & H. Co.* v. *United States*, 260 U. S. 327, 330.

what appears justly due in another aspect from that in which the demand is conceived.[19]

CONCLUSION.

Upon further consideration, it is submitted the denial of the petition should be vacated, and such further relief be granted as the justice of the case may require.

Respectfully,

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[19] *United States* v. *Burns*, 79 U. S. (12 Wall. 246, 245.
Clark v. *United States*, 95 U. S. 539, 543.
United States v. *Behan*, 110 U. S. 338, 347.
Wisconsin C. R. Co. v. *United States*, 164 U. S. 190, 212.
District of Columbia v. *Barnes*, 197 U. S. 146, 154.